FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY R. MACDONALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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In our opening brief, we set forth in some detail why a pre-trial order denying a motion to dismiss an indictment on speedy trial grounds meets none of the criteria of the "collateral order" exception to the final judgment rule and thus cannot be appealed in advance of trial. Respondent makes little effort to take issue with our analysis, instead relying largely on the erroneous notion that the Speedy Trial Clause creates "a right not to be tried" (Br. 35) and asserting that, in any event, his case does not fit within the normal mold of speedy trial claims.[1] Our initial discussion

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[1]For example, respondent contends (Br. 33) that the threshold requirement of a "fully consummated decision" (*Abney* v. *United States*, 431 U.S. 651, 659) was satisfied here because "[t]here is nothing tentative about [the district court's] ruling. It does not, on its face or by implication, indicate that anything which might later happen at trial could affect it." Even assuming that respondent's interpretation of the trial judge's decision is correct, the fact remains that the determination whether an order is an appealable final decision under 28 U.S.C. 1291

fully answers respondent's submission on the jurisdictional issue, and we will therefore not reiterate those arguments. We believe, however, that respondent's claim that the pre-indictment delay in this case violated his Sixth Amendment right to a speedy trial deserves a short response.

1. Relying on *Klopfer* v. *North Carolina*, 386 U.S. 213, respondent contends (Br. 42-44) that his Sixth Amendment right to a speedy trial irrevocably attached with his arrest on three specifications of murder by the Army in April 1970 and was not disengaged when those charges were dismissed in October 1970. He therefore argues that the Speedy Trial Clause was implicated by the entire delay between April 1970 and his scheduled trial date on the indictment returned in January 1975, despite the fact that no charges were pending against him during the four year interval between the dismissal of the military charges and the issuance of the indictment. This is so, he urges, because even after the military charges had been dropped he continued to suffer general anxiety and concern over the prospect that he might be prosecuted by the federal government at some future date and he was forced to retain counsel to protect his interests.

As we observed in our opening brief, however, *Klopfer* offers no support for respondent's position. Respondent continues to ignore the critical distinction between this case and *Klopfer*, where the defendant had been under indictment for the entire period of the delay that was held to violate the Sixth Amendment.

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must be made in light of "the generality of cases" (*Carroll* v. *United States*, 354 U.S. 394, 405) and "cannot depend upon the facts of a particular case" (*ibid.*). Respondent does not dispute our assertion that it would be the rare case involving substantial pre-trial delay in which the various factors listed in *Barker* v. *Wingo*, 407 U.S. 514, could be intelligently assessed prior to trial.

We submit that *United States* v. *Marion*, 404 U.S. 307, rather than *Klopfer*, should control the outcome of this case. In our opening brief, we invited respondent to distinguish his status after the dismissal of the military charges from that of the defendants in *Marion*, who, like respondent, were aware well before their indictment that they were the focus of an ongoing criminal investigation, were the subject of widespread public speculation that they had been involved in criminal wrongdoing, and were obligated to incur legal expenses as a result of the government's inquiries. Respondent has understandably declined that invitation, for no plausible distinction can be drawn. This Court recognized in *Marion* that an individual who is the publicized target of a criminal investigation inevitably suffers harmful emotional and financial consequences during the pendency of the investigation (404 U.S. at 320), but it nevertheless held that the "particular protections" (*ibid.*) of the Speedy Trial Clause did not attach until a formal criminal charge has been brought. Precisely the same analysis compels the conclusion that respondent's Sixth Amendment right was not implicated during the period between October 1970 and January 1975.

2. We argued in our brief that respondent has failed to demonstrate any actual prejudice to his defense as a result of the delay prior to his indictment. Respondent has now attempted to remedy this deficiency by introducing materials (Br. App. A and B) that were not submitted to either the district court or the court of appeals and are consequently not part of the record in this case. Although we believe that this supplementation is improper, respondent's belated efforts to document his claim of actual prejudice are in any event unpersuasive.

a. Respondent first relies upon an affidavit from one of his attorneys (Br. App. A), stating that Pamela Kalin, the babysitter for respondent's children, had been unable to

identify any of the murder weapons when she was interviewed immediately after the crimes but was able five years later to testify before the grand jury that the ice pick used to stab Colette MacDonald was similar to one she had used at respondent's residence. This change in the babysitter's recollection of pertinent facts, according to respondent, constitutes "telling confirmation of the danger of altered memories" caused by the delay in procuring the indictment (Br. 53). Respondent's complaint, however, is not that Kalin's memory has deteriorated over time but rather that her present recollection is quite unfavorable to him. Although we do not dispute that respondent's chances for an acquittal could be damaged if Kalin were to testify at trial as she did before the grand jury, this Court has never suggested that a strengthening of the government's case during a period of delay is the kind of "prejudice" against which the Speedy Trial Clause was intended to protect. Rather, it is the destruction of evidence favorable to the defense or the loss of memory by *defense* witnesses (*Barker* v. *Wingo, supra*, 407 U.S. at 532) that is significant for speedy trial purposes.

Perhaps more important, respondent's claim only serves to reinforce our contention that it is ordinarily impossible in advance of trial to determine accurately the degree to which defense capabilities may have been impaired by a pre-trial delay. Respondent will have been "prejudiced" only if (1) Kalin testifies at his trial, (2) she reaffirms her grand jury testimony, (3) defense efforts to impeach that testimony with her prior inconsistent statements are unavailing, (4) there are no other witnesses presented to corroborate her testimony,[2] and (5) respondent is

[2]In fact, the government expects two other persons (Capt. Ronald Harrison and Mildred Kassab), both of whom were interviewed immediately after the murders, to corroborate Kalin's testimony about the icepick (G.J. Harrison 14-15; G.J. Kassab 52-53).

convicted. At this juncture, however, it is sheer speculation to predict whether any of these conditions will be satisfied at respondent's trial.

b. Respondent also contends (Br. 56) that "important, sophisticated tests for the accurate identification of the blood and other physical evidence were not made by the government and are no longer possible by the defense because of * * * deterioration and changes in the physical evidence during the unjustified five-year delay in this case." In support of this claim, respondent has submitted the affidavit of Dr. John Thornton, a forensic scientist (Br. App. B), which states that, at the time of respondent's indictment in January 1975, it would not have been possible to analyze the blood stains found at the crime scene for their "serum types and isoenzyme types, which are exceedingly useful genetic markers and provide considerable discrimination among individuals, * * * [because] of their deterioration with time" (*id.* at 6).[3]

We doubt that this is the proper forum in which these allegations should be considered for the first time. We note, however, that respondent has failed to mention that the methodology for detecting serum proteins and isoenzyme factors in dried blood stains was not employed by any criminalistics laboratory in the United States during the period in which such testing could have been performed on the blood stains from respondent's residence. It is our understanding that information concerning these techniques of blood typing was not widely disseminated in this country until 1972, two years

[3]Analysis for serum and isoenzyme types permits discrimination between persons having the same blood-type under the accepted A-B-O genetic marker system for the identification of dried blood stains.

after the stains involved in this case came into existence.[4] Furthermore, even if this technology had been available and practiced in the United States before that time, it would have been necessary to perform the tests within a year or less after the crimes, because the blood factors with which serum protein and isoenzyme analyses are concerned do not persist for more than a few weeks or months after the formation of blood stains.[5]

Thus, while it is true that such tests could not have been performed as of the date of respondent's indictment in 1975, it is a distortion of the facts to rely upon that conclusion as evidence that respondent has suffered actual prejudice as a result of the passage of time between the C.I.D.'s referral of respondent's case to the Department of Justice in June 1972 and his indictment in January 1975. Respondent would have been unable to perform the blood tests now suggested by Dr. Thornton, and presumably would have suffered the same "prejudice," had he been indicted and tried in 1972, a time at which even respondent concedes there would have been no Sixth Amendment bar to his prosecution.[6]

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[4]To our knowledge, these techniques first received attention in the United States in a monograph published by the Law Enforcement Assistance Administration in December 1971. See B.J. Culliford, *The Examination and Typing of Bloodstains in the Crime Laboratory* (1971), a copy of which we are lodging with the Clerk of this Court.

[5]See generally C.G. Denault, H.H. Takimoto, Q.Y. Kwan, and A. Pallos, *Detectability of Selected Genetic Markers In Dried Blood Upon Aging* 4 (September 1976). We are lodging a copy of this report with the Clerk of this Court.

[6]This error pervades respondent's entire discussion of the prejudice he has allegedly suffered because of the pre-trial delay. Thus, his complaint that "there was a total failure to protect the crime scene from disturbance" (Br. 2) and that, as a result, flower pots, pajama tops and bedding were negligently moved (Br. 3, 53) and fingerprints

The technology that was available at the time respondent's wife and children were murdered permitted classification of the blood stains under the established A-B-O genetic marker system. Each of the stains in respondent's apartment was analyzed and classified under that system during the C.I.D.'s initial investigation of the crimes.[7] As Dr. Thornton's affidavit points out, typing of the blood stains under this system is still possible today, should respondent wish to challenge the results of the earlier tests. Respondent's argument about the blood stains, however, seems decidedly to have been an afterthought: although respondent obviously has always known about the dried blood stains and has been aware since mid-1970 that A-B-O grouping tests had been done by the C.I.D., and although the investigating officer at the Article 32 hearing ruled favorably on his motion to have all of the physical evidence made available for testing by defense experts, respondent has never sought to have any tests performed on the blood stains (E-8, at 485-486; E-21, at 658; E-57).

c. Dr. Thornton's affidavit also asserts that "[i]t would be virtually impossible at this time to obtain exemplar samples of some materials, for instance candle wax that is contemporaneous in a compositional sense with materials at the time the event occurred" (Br. App. B 6). The relevance of this allegation to respondent's claims of prejudice is puzzling.

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destroyed (Br. 3-4), ignores the fact that these events had already transpired (and these charges could equally have been levelled) within five weeks, not just five years, after the crimes and hence are not attributable to any governmental delay. In any event, hundreds of photographs of respondent's apartment were taken on the day of the crimes, so there would be no need at trial to rely on the recollections of witnesses.

[7]Each of the victims and respondent had a different one of the only four blood types (A, AB, B, O) (A. 135), thus facilitating attempts to identify specific blood stains with family members.

At one time, respondent contended that one of the intruders who had allegedly murdered his family had carried a lighted candle (A. 151). Wax drippings were found in several places around respondent's residence, including on the bedclothes in Kimberly's bedroom, although not in the area where respondent claimed the candle carrier had stood. During the early stages of the investigation, the chemical composition of the drippings was compared with the wax in six candles found at the crime scene, and it was determined that none of the candles was the source of the drippings (A. 157).[8] Thus, the most favorable result that respondent could hope to produce through new testing of the wax drippings is precisely what the government's own examination established long ago—namely, that the drippings did not come from any known source of wax in respondent's residence and, hence, may have come from wax brought by an intruder. We therefore fail to comprehend how respondent's asserted inability to perform certain new tests on the wax could conceivably have prejudiced his defense.

For the reasons stated herein and in our opening brief, the judgment of the court of appeals should be vacated and the case should be remanded with directions to dismiss respondent's appeal for lack of jurisdiction.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JANUARY 1978.

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[8]These candles are still in existence.